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No. 527

In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1954, dismissing the Board's petition that The Warren Company, Incorporated, be adjudged in contempt for violating a decree entered by that court enforcing, *inter alia*, a bargaining order issued by the Board against the Company.

OPINIONS BELOW

The opinion of the court below in the instant contempt proceedings (Appendix B, *infra*, pp. 3A-12A) is reported at 214 F. 2d 481. The opinion of the court below, pursuant to which the

original decree (R. 106–108) was entered, is reported at 197 F. 2d 814 (see *infra*, pp. 14A–15A).

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. 13A) was entered on June 30, 1954. The Board's petition for rehearing (R. 220–224) was denied on August 13, 1954 (R. 225). The time for filing a petition for certiorari was extended, by order of Mr. Justice Black dated November 4, 1954, to January 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In issuing a decree enforcing an order of the National Labor Relations Board to bargain collectively with the Union, the court below, on settled authority, rejected the Company's defense that the Union's loss of majority status following the Company's unlawful refusal to bargain constituted a bar to enforcement. On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company reiterated the defense of the Union's loss of majority. The question is whether the court below properly dismissed the contempt petition on the ground that the "different considerations" applicable to contempt proceedings validate the defense which admittedly was not a bar to a decree of enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 1A–2A.

STATEMENT

The relevant facts giving rise to the instant contempt proceeding are, as shown by the record and the pleadings, virtually undisputed.

A. Events prior to the contempt proceeding

On November 20, 1948, and thereafter, the respondent Company, asserting a doubt as to the majority status of the Union (District Lodge No. 46, International Association of Machinists), declined to recognize the Union which had been designated by the majority of the employees in an appropriate unit as their collective bargaining representative. Promptly after the Union's request for recognition, the Company discharged several Union adherents. Unfair labor practice charges were filed against the Company and, pursuant to complaint and hearing thereon, the National Labor Relations Board, on June 30, 1950, issued a Decision and Order in which it found that the Company's discharge of the Union adherents was discriminatory within the meaning of the National Labor Relations Act, and that its refusal to recognize and bargain with the Union, not being motivated by a good faith doubt of the Union's majority status, was also violative of the

Act. Accordingly, the Board directed the Company to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, to bargain collectively with the Union upon request, and to post notices stating that it would do so. *Matter of the Warren Company*, 90 NLRB 689.

Following the issuance of the Board's Decision and Order, the Company reinstated the discharged Union members with back pay and posted notices (R. 104). However, despite repeated requests by the Union for bargaining conferences, the Company met with the Union on only one occasion, September 8, 1950 (R. 113, 124–125). On that occasion the Union submitted a proposed contract, explaining its provisions. The Company took no position at this meeting with respect to the proposed contract but undertook to study the proposal and to make its position known later (R. 113–114). Further repeated Union requests for bargaining negotiations or for a statement of the Company's position with respect to the proposed contract were unavailing (R. 114). Moreover, on August 6, 1951, just before the Board filed its petition for enforcement in the court below, the Company wrote the Union that, of the employees originally comprising the unit found appropriate by the Board, and a majority of whom had designated the Union as the bargaining representative, only two remained

in the Company's employ and that the Company doubted the Union's majority status (R. 157–158).[1]

On the Board's petition in the court below for enforcement of its order, the Company urged that, notwithstanding the sufficiency of the evidence to support the Board's findings and order, enforcement should be denied "because the order has been obeyed in all of its provisions and, because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it" (R. 104; 197 F. 2d 814). The court below rejected these contentions on the authority of this Court's decision in *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563 (R. 103–105; 197 F. 2d 814, *infra*, pp. 14A–15A).

[1] The Company's August 6 letter stated that the original complement consisted of nine employees, one of whom was found by the Board to be a supervisor (90 NLRB, at 709). Of the remaining eight, seven had authorized the Union to represent them for purposes of collective bargaining (*ibid.*). As already noted, several of the latter had been discharged but were reinstated shortly after the Board's order of June 30, 1950. By August 6, 1951, however, these and other employees were apparently no longer in the Company's employ and the unit, according to the August 6 letter, consisted of eight employees, containing only two of the original group, both of whom had signed Union authorization cards (90 NLRB, at 709).

and, on August 7, 1952, entered its decree enforcing the Board's order (R. 106–110).[2]

On August 26, 1952, nineteen days after the entry of the decree, the Company notified the Board and the Union that, as stated in its Response to the Board's petition for Enforcement, the Company had already complied with all affirmative provisions of the Board order, including notice-posting, reinstatement of discharged employees with back pay, and bargaining,[3] and that the Union no longer represented a majority of the employees since only two of the employees in the original unit remained in the Company's employ (R. 161–162). The Company also stated that "while the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding, it can be urged as a defense in further proceedings" (R. 161).

Consistently with this position, the Company for the next several months failed to comply with

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[2] The court below noted that the *Mexia* decision settled the doctrine that an alleged loss of majority may not be urged as a defense in an enforcement proceeding, and that the same decision expressly ruled that compliance with a Board order does not affect the right to enforcement, pointing out that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings' in the event a renewal of the unfair practice occurs after the enforcement order" (197 F. 2d 814, *infra*, p. 15A).

[3] Admittedly, the only "bargaining" which had taken place theretofore was the meeting of September 8, 1950, prior to the entry of the enforcement decree, at which the Union submitted a proposed contract and the Company took no position (*supra*, p. 4).

repeated Union requests for a bargaining conference and/or for the submission of relevant data concerning wages and working conditions (R. 114–118). Throughout its extended correspondence with the Union, the Company, while professing its willingness to meet with the Union, persisted in the position that it had already bargained with the Union and that the Union no longer represented the employees (R. 164–172). On January 19, 1953, the Company and the Union met for the second and last time. The Company took the position, confirmed in its letter of the following day, that the Company "was in doubt as to the majority status of the Union, and for that reason, hesitated to bargain with the Union on the matter of a contract" (R. 172). The Company asked the Union to consent to a decertification election to be conducted by the Board, and upon the Union's refusal to consent, itself filed with the Board a petition for a decertification election (R. 117, 172, 174, 192). Attached to the petition was a communication to the Company from five of the employees stating that the Union did not represent them and requesting that it be decertified (R. 192–192).[4] On March 4, 1953, the

[4] This communication was dated November 3, 1953, approximately three months after the court below entered its decree enforcing the Board's bargaining order. It is noteworthy also that two of the employees concerned, Smelley and Reives, were initial adherents of the Union in November 1948 when the Union initiated its prolonged and unsuccessful effort to obtain recognition and bargaining rights.

Board affirmed its Regional Director's dismissal of the petition on the ground that the Company had not yet complied with the bargaining requirements of the Board order and court decree (R. 118, 193–195). A further Union request for bargaining failed to elicit even a reply from the Company (R. 132).

Accordingly, the Board in September 1953 initiated contempt proceedings in the court below to compel compliance by the Company with the bargaining requirements of the decree (R. 111–177).[5]

B. The contempt proceeding

The Board's petition that the Company be adjudicated in contempt set forth in substance the facts recited above (R. 111–177). The Company filed its Answer to the Board's Petition (R. 180–201), admitting the factual allegations of the Board's petition, but denying its conclusions. Specifically, the Company's Answer alleged that it had complied with the Board order and court decree except as to the bargaining requirement (R. 184, 196). In that respect, the Answer repeatedly and unequivocally admitted its refusal

[5] In its petition to the court below, the Board sought relief both in civil and criminal contempt and included an allegation that, in addition to the Company's noncompliance with the bargaining requirement, the Company had also failed to comply in good faith with the notice-posting provision of the order and decree. The review now being sought, however, pertains only to the failure of the court below to grant relief in civil contempt with respect to the bargaining order.

to bargain with the Union (R. 184, 185, 186–187, 196).[6] However, the Answer reiterated the position the Company had taken in the court below on the petition for enforcement; *i. e.*, that the Union did not and never had represented a majority of the employees (*ibid.*). The Answer alleged further that five out of the six employees presently employed by the Company had specifically repudiated the Union; that the Union had ignored the Company's repeated requests to demonstrate its majority anew; and that the Board had dismissed the Company's petition for a decertification election (R. 191–195). The Answer further averred that, under these circumstances, the Company's refusal to bargain with the Union after the entry of the decree was not an unlawful act, hence the Board's petition for adjudication in contempt should be dismissed.

On June 30, 1954, the court below entered its opinion denying the Board's petition (Appendix B, *infra*, pp. 3A–12A). Finding on the basis of the pleadings that the Union had lost its majority

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[6] The only qualification, if any, to this statement is the reference on page 11 of the printed Answer (R. 180) where the Company quotes from its Response to the Board's petition for enforcement in the prior proceeding to the effect that it "complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract. At all times Respondent was in doubt that the Union represented a majority * * *." The meeting referred to is obviously the meeting of September 8, already described (*supra*, p. 4).

even prior to the decree of enforcement, the court below ruled that the Company's admitted refusal to bargain on that ground was warranted notwithstanding that the court had rejected the identical defense in the enforcement proceeding (*infra*, pp. 7A–12A). The court agreed that on settled authority the defense of loss of majority following an unlawful refusal to bargain could not be urged as a defense to an enforcement proceeding, but it went on to hold (*infra*, p. 11A) that the considerations underlying that rule have no application in a contempt proceeding. The court declared that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the Act, that employees are entitled to choose their own bargaining representative and may not have one of their own choosing forced upon them, issue a contempt order which has the effect of doing so" (*ibid*).[7]

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[7] In the course of its opinion, the court below observed that the Company had "made an offer to bargain with the union" (*infra*, p. 9A); and that the Company had "complied * * * by agreeing to bargain with the union" (*infra*, pp. 11A–12A). These comments, as the Board noted in its petition for rehearing, are patently inconsistent with the Company's express admission that it had refused to bargain with the Union and with the undisputed facts recited above. Similarly, the statements of the court below that the Union's loss of majority was not the result of "unfair labor practices" and was "without fault" on the Company's part (*infra*, pp. 7A, 8A) overlook the uncontroverted fact that the Company

REASONS FOR GRANTING THE WRIT

It is settled law that where a union's majority status is dissipated, after an employer's unlawful refusal to bargain, the Board may appropriately find that such conduct has undermined the union's representative status and require the employer to bargain with it for a reasonable period, despite the loss of majority. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. It is also established that the claim of an intervening loss of majority, following the employer's unlawful refusal to bargain, is no defense to a judicial proceeding for enforcement of an order requiring the employer to bargain with the union. *National Labor Relations Board* v. *Mexia Textile Co., Inc.*, 339 U. S. 563. And this Court has recently held that the Board may also properly require an employer to bargain with a certified union for one year despite an intervening loss of majority not attributable to any unfair labor practices by the employer, and that such order is

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from the beginning never remedied its unlawful refusal to bargain. The court's further statement (*infra*, p. 7A) that, in the Board's view, the order as enforced "required the respondent to bargain indefinitely" with the Union is likewise erroneous. The Board's position was, as stated in its petition for rehearing that "established legal precedents require respondent to remedy its unfair labor practice (the prior refusal to bargain with the union) by good faith bargaining with the union for a 'reasonable' period before it may challenge the union's majority status and refuse to bargain with the union on the ground that it no longer represents the employees."

entitled to judicial enforcement. *Brooks* v. *National Labor Relations Board*, No. 21, this Term, decided December 6, 1954.

In the enforcement proceeding out of which the present contempt action arises, the court below recognized that a union's alleged loss of majority following an employer's wrongful refusal to bargain cannot be urged as a defense to a decree enforcing a bargaining order and accordingly enforced the Board's order directing respondent to bargain (197 F. 2d 814, 815, *infra*, pp. 14A–15A). But in the contempt proceeding instituted to compel compliance with its decree, the court accepted the same defense which it had rejected in the enforcement proceedings and dismissed the proceedings on the ground that different "considerations" were applicable in contempt proceedings. The effect of the latter holding was, of course, to render the initial decree a nullity, since the remedy afforded by the decree is worth little more than its sanction, contempt.[8] If the Fifth Circuit were correct in its view that at the contempt stage it may accept the very same defense which it is required to reject in the enforcement proceedings,

[8] "It is no more than a commonplace to note that the value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt." Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943).

the result would be to nullify enforcement decrees in all loss-of-majority situations like those of either *Franks Bros.* or of *Brooks*. We submit that the ruling of the court below on the latitude of its contempt powers is inconsistent with the uniform holdings of this Court, as well as in square conflict with decisions of other courts of appeals, and that the question presented is of critical importance in the administration of the National Labor Relations Act.

1. The view of the court below that, in a contempt proceeding for violation of its decree, the controlling criterion is the discretion of the court as to "what order will best serve the public interest and at the same time vindicate its own decree" (*infra*, p. 11A), and that it may disregard well-settled principles of substantive law otherwise applicable has repeatedly been rejected by this Court. The basic doctrine was laid down in *Union Tool Co.* v. *Wilson*, 259 U. S. 107, where this Court said (at p. 112):

> In the determination of the question whether ~~where~~ an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. [Citing cases.] Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts.

The doctrine thus enunciated was recently applied in a contempt proceeding instituted by a federal administrative agency, *Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585. In that case, the defendant was found guilty by a district court in civil contempt for failure to comply with a court order enforcing a subpena *duces tecum* issued by the Commission in aid of an authorized investigation. The district court imposed an unconditional fine but refused to grant remedial relief designed to compel production of the subpenaed documents. On appeal to the Ninth Circuit, the court ruled that the imposition of the unconditional fine was error and directed that the defendant be imprisoned until he produced the documents (157 F. 2d 65). Affirming the decision of the court of appeals, this Court stated (330 U. S. at 590–592):

> The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits [citation omitted], it is entitled to the aid of the court in obtaining them. A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. * * *
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> * * * * *
>
> * * * the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion.

In the recent case of *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, a contempt proceeding instituted by the Wage and Hour Administrator for violation of a prior decree, this Court, reversing the court below, reemphasized the sharp limitation on a court's discretion to grant or withhold remedial relief. The Court noted that (at p. 191):

> The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge * * * [citing *Union Tool; supra*]. The private or public rights that the decree sought to protect are an important measure of the remedy.

Where, as here, the only justification proffered for the admitted refusal to comply with the bargaining provision of the prior decree was an alleged loss of majority which followed upon a wrongful refusal to bargain, a defense which on "well-settled principles" (*Union Tool, supra*) was not a bar to a decree of enforcement, withholding of appropriate remedial relief was clearly an abuse of discretion. Accord: *Parker* v. *United States*, 153 F. 2d 66, 70 (C. A. 1); *Sauber* v. *Whetstone*, 199 F. 2d 520, 523 (C. A. 7).

2. Squarely in conflict with the decision below is the ruling of the Court of Appeals for the Fourth Circuit in *Great Southern Trucking Co.* v. *National Labor Relations Board*, 139 F. 2d 984, cer-

tiorari denied, 322 U. S. 729.[9] In that case, which arose out of an unfair labor practice strike following a wrongful refusal to bargain (127 F. 2d 180, 184), the employer contended in the contempt proceeding that it was relieved of its obligation to bargain under the decree because the union had lost majority status since the entry of the decree; it alleged that none of the strikers who had accepted reinstatement which had been offered pursuant to the decree were still in the company's employ and a majority of the replacement employees had signed a petition stating that they did not desire to be represented by the union (139 F. 2d, at 985). There also, as here, the Board denied a company request to redetermine the union's majority status (*ibid.*). The Fourth Circuit rejected the contention and held the employer in

[9] See also *West Texas Utilities Co.* v. *National Labor Relations Board*, 206 F. 2d 442, 449, certiorari denied, 346 U. S. 885, where the Court of Appeals for the District of Columbia Circuit rejected a contention made by way of "defense and counterclaim" that because of the receipt of petitions from employees showing, allegedly, that the union no longer represented a majority of the employees; the employer should not be held in civil contempt for disregarding the court's order to bargain. Like defenses were also recently rejected by the Court of Appeals for the Tenth Circuit in two unreported contempt cases, *National Labor Relation Board* v. *Conover Motor Co.* and *National Labor Relations Board* v. *Phelps Brothers Service Co.*, both orders entered April 23, 1953, and by the Court of Appeals for the Second Circuit in an unreported contempt case, *National Labor Relations Board* v. *Todd Co., Inc.*, order entered June 27, 1950, certiorari denied, 340 U. S. 864.

contempt. Citing (among other decisions) the First Circuit's opinion in *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, subsequently affirmed by this Court, 321 U. S. 702, the court noted that the company's unlawful and protracted refusal to bargain with the union "necessarily must have had a telling impact" both with respect to maintaining the Union adherence of old employees[10] and with respect to obtaining new adherents from the incoming employees. Accordingly, the court held that "Inasmuch as the Company's own unlawful conduct created an atmosphere which made normal union growth and allegiance difficult, it will not now be permitted to urge its labor turnover and ensuing loss of union majority status as the basis for avoiding compliance with the remedial bargaining provision of our decree" (139 F. 2d, at 986). Accord: *Franks Bros.*, 321 U. S., at 705. Addressing itself to the contention, given decisive weight by the court below, that an adjudication of contempt would have the effect of imposing upon employees a representative that they had specifically repudiated, the court noted that under all the circumstances such a disavowal of the union could not be regarded as

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[10] As already noted, in the instant case the two original adherents of the Union (Smelley and Reives) who remained in the Company's employ finally repudiated the Union in November 1952, four years after its initial demand for recognition and bargaining, two years after the Board's order, and three months after the court decree (*supra*, p. 7).

"a true expression of their unhampered will. On the contrary, it rather indicates that at long last, after five years, the Company has been able successfully to thwart the employees' attempt to bargain collectively through representatives of their own untrammeled choice" (*ibid.*). Finally, the court noted that its disposition of the case did not grant to the Union a permanent status as exclusive bargaining representative for any fixed period of time (at p. 987):

> *After the conditions of free choice have been restored by collective bargaining, in good faith on the part of the Company,* then should these employees desire to be represented by some body other than the Union, they may then avail themselves of the statutory procedure of the Act itself * * * in order to guarantee that their genuine desires can be ascertained and respected. But until the Company purges itself of its unlawful conduct in violating our decree, the employees' true desires "are matters of speculation and argument." [Emphasis in original.]

Accord: *Franks Bros.*, 321 U. S., at 705–706, citing the *Southern Trucking* case.

3. The question presented here is of manifest importance in the administration of the Act and in administrative law generally. In the final analysis, the National Labor Relations Act, like comparable regulatory statutes, depends for its effective enforcement upon the exercise by the

courts of appeals of their contempt powers. A Board order is not enforced until it is actually obeyed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269–270), and Congress clearly relied upon the remedy of contempt as the ultimate sanction to secure obedience (*National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 569).

The reservation by the court below of complete and independent discretion in withholding sanctions to compel compliance with its prior decree enforcing the Board's order, in the face of its acknowledgment that the applicable settled law required the entry of that decree, subverts the decree and destroys the whole unfair-labor-practice structure, devised by Congress and implemented by the Board and the courts, at its crucial contempt stage.[11]

This is not to say that the standards for enforcement of Board orders and for finding civil contempt may not vary in other respects.[12] They may not vary, however, with respect to an employer's obligation to remedy his prior wrongful

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[11] See also the disposition by the court below of recent cases not dissimilar from the instant proceeding, *National Labor Relations Board* v. *Aldora Mills*, 197 F. 2d 265, commented upon in 54 Col. L. Rev. 613; *National Labor Relations Board* v. *Red Arrow Freight Lines, Inc.*, 213 F. 2d 260.

[12] Thus, compliance with a Board order, while not a bar to enforcement, would be a complete defense to a civil contempt action. See the *Mexia* case, *supra*.

refusal to bargain where the sole defense is no more than a continuation of that wrongful conduct and a renewed attempt to reap the benefits of that refusal because of the defection of union adherents which may well have been caused by such wrongful action. To tolerate such a procedure would truly be "to foster experimentation with disobedience" (*Maggio* v. *Zeitz*, 333 U. S. 56, 69).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY 1955.

APPENDICES

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings

and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED, RESPONDENT

Petition for adjudication in civil contempt and for other civil relief; and request for institution of adjudication in, and punishment for criminal contempt

(June 30, 1954)

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and WRIGHT, District Judge

HUTCHESON, *Chief Judge:* Filed by the board to have respondent adjudged in civil contempt of our decree in cause No. 13772 on the docket of this Court, and also to suggest that it be proceeded against as for criminal contempt, the petition for the adjudication in civil contempt alleged that respondent has failed and refused, and con-

times to fail and refuse, to comply with paragraphs 1 (b) and 2 (d) of the decree.[1]

In reply, respondent, setting out the whole of our decree with its various prohibitions and injunctions, alleged that even before its entry it had complied, and is now in compliance with, each and every one of its provisions, including offering to reinstate, and reinstating, the five named employees and paying them the amounts determined to be due them, except that since the decree of this Court it has refused, and is refusing, to bargain collectively with the union as bargaining agent of its employees for the reasons set out in its answer as follows. The union does not represent, and has not for a long time represented its employees as bargaining agent. As early as Nov. 3, 1952, long after respondent had

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[1] Requiring respondent to:

"1. Cease and desist from:

* * * * * * *

"(b) Refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive bargaining representative of all its tool and die makers, machinists, die setters, helpers, and apprentices, excluding clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act;

"2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

* * * * * * *

"(d) Upon request, bargain collectively with District Lodge No. 46, International Association of Machinists, as the exclusive representative of the above-mentioned employees and, if an understanding is reached, embody such understanding in a signed agreement;"

reinstated and reimbursed its employees, respondent received a communication[2] from five of the six employees in the unit affected, stating that the union did not represent them and requesting that it be decertified, and respondent, finding itself unable to prevail upon the union to furnish it countervailing evidence or to consent to an election, on January 27th, filed a petition with the regional board for an election, attaching to it the said request of its employees.

Thereafter and within ten days, it petitioned the board for a review, citing our case of *N. L. R. B.* v. *Aldora Mills*, 197 F. (2d) 265, and stating in part: "The law does not contemplate that an employer bargain with a representative who is not the true and lawful representative of the employees."

On March 4, 1953, the board, in a letter[3] to respondent's counsel, denied the appeal.

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[2] "November 3, 1952:

"We the undersigned employees of the Warren Co. do not want the International Association of Machinists or any other union to represent us in the matter of collective bargaining with our employer. We request that the union be decertified as the bargaining agent.

Percy A. Wright,
E. L. Reives,
J. R. Mitchell,
P. J. Water,
C. A. Smelley."

[3] The letter is as follows:

"The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearings in the above case and has decided that the Regional Director's dismissal was proper on the ground that pursuant to a Decree of the United States Court of Appeals entered on August 7, 1952, enforcing the Board's Order in Case No. 40-CA-622, the

On the basis of this showing, respondent asserts: that following this court's decree, it has exhausted every recourse for a fair determination by the board of the majority status of the union; that it has been denied these orderly processes; and that it does not believe that this court would wish or require it to bargain with the union which does not represent, and has not for a long time represented, the employees as bargaining agent. For this reason and for this reason alone, and not because it is contemptuous of this court's decree, it has failed to bargain collectively with the union.

The board, in its reply to respondent's answer, does not deny or otherwise put in issue the allegations of fact in it. It merely avers that these facts are not material. As the board sees it, the only material facts are these: the board determined that the respondent was guilty of unfair labor practices and ordered that it bargain with the union as representative and bargaining agent for the unit; the court granted the board's petition for enforcement of that order and ordered it enforced; and the respondent admitted that, though board and court have so ordered, it refuses to do so. On the basis of these admitted facts, the board insists that respondent stands without defense and, as matter of law, must be adjudged in civil contempt and required to bargain, and that the court should also proceed in criminal

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Employer is obligated to bargain with Lodge No. 46, International Association of Machinists, AFL, for the employees described in the instant petition and if an understanding is reached, to embody such understanding in a written agreement."

contempt and punish respondent by fine or imprisonment or both.

We cannot at all agree with these views. On the contrary, we think the facts alleged by respondent and in effect admitted by petitioner make it clear that the charge of criminal contempt, that is of wilful and deliberate defiance of our decree, is wholly without legal or factual basis, and that, on the issue of civil contempt, the facts make strongly for, if they do not in fact and in law compel, a negative answer to the question this proceeding presents, and thus make out a complete defense to the charge.

This question is, must respondent be adjudged in civil contempt of our order because, under the facts of this case detailed in its answer, it refuses to bargain with a union which does not now represent, and has not for a long time represented, its employees and which they have requested respondent in writing not to recognize as bargaining agent for them.

The board's position on the question shortly stated is that since the board directed the respondent to bargain with the union as the representative of the unit in question, and we directed the enforcement of the board's order, its and our order fixed the status of the union as bargaining representative of the unit and required the respondent to bargain indefinitely with it, even though, without fault on respondent's part, the membership of the unit has changed its composition so that its members are no longer members of the union, and, in addition, five out of six of the employees constituting the unit have filed a written request to respondent not to bargain with it as their

representative. This position is apparently based in part upon the board's idea that after it has made a determination as to the bargaining agent of the employees, it is not for the employees but for it to determine who shall continue to represent them and in part upon decisions of the court that in enforcement proceedings it is not a defense that the union has lost its majority if this loss is due to the wrongful actions of the respondent.

Respondent, while conceding the rule to be as stated by the board, where the proceeding is one for enforcement of the board's order and the evidence shows that the loss of representation is due to unfair labor practices of the employer, insists that the rule does not, it cannot apply here, because (1) it is affirmatively shown that the loss of the union's position as bargaining agent is not the result of unfair labor practices but of a turnover of the employees or a change of opinion on their part, not brought about or contributed to by the employer, and (2) because this is not an enforcement but a contempt proceeding.

As it applies its argument to the undisputed facts here presented, the respondent states it thus: Granted that because of the findings of the board which were affirmed by this court, appellant had no right to defend against the enforcement proceeding on the ground that, though the contrary was found by the board, the union did not in fact represent its employees, an entirely different question is presented in this contempt proceeding. This results from the admitted facts that after the entry of the board's order and long before the entry of our decree, the respondent posted the required notices, reinstated the five discharged em-

ployees with back pay and made an offer to bargain with the union, and later, and without fault on respondent's part, the employees in the unit repudiated, and are still repudiating the union as bargaining agent.

It points to the undisputed facts of record: that before and after the entry of the decree, without fault on the part of respondent but due solely to the natural turnover among its employees, the union lost its majority and ceased to represent the unit; that based upon the written request in November of 1952, of five of the six employees then constituting the unit, the respondent in January of 1953, filed with the regional office of the board a petition requesting it to determine by an election whether the union represented a majority of the unit, and the regional director first, and the board later, denied the petition for an election.

So pointing, it insists that it is the board, and not the respondent, which is preventing the employees from choosing their own representative and forcing upon them a representative not of their own choosing, and the respondent is, therefore, not in contempt of our decree whose sole purpose was, and whose effect ought to be, to protect the employees' right of choosing their own representative and of not having one they did not choose and do not want thrust upon them. So insisting, respondent, on the basis of the many cases which it cites,* including our own case of

* *Frank Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, in which the court held that "The Board's order does not fix a permanent bargaining relationship without regard to new situations which may develop"; *N. L. R. B.* v. *Aldora Mills*, 197 F. (2)

Aldora Mills, *supra*, urges upon us, that in a contempt proceeding, unlike in an enforcement proceeding, the question of the reality of the claimed representation can and will be inquired into and when, as here, it appears that the enforcement of the court's decree in accordance with its terms would work a present injustice to and injury upon the employees by forcing them to accept a bargaining agent which they did not choose and do not want, the court will not, under the guise of holding respondent in contempt, force upon the employees a bargaining agent they do not want. Particularly will it not do so where it appears, as here, that the board, by refusing to consider or otherwise lend its assistance to the decertification petition, and not the respondent, is responsible for the situation which now exists.

The board meets this argument with the countercontention that it stands, as to the decree entered in its favor, in the same case and entitled to the same extent to enforce it as written, as a private litigant who has obtained an injunctive order in its favor, and that since in such a situation the court would not reconsider the equities as between the parties to the decree, and upon that reconsideration refuse to hold the contemnor in contempt, neither will the court do so here.

256, and cases cited in it; *Mid-Continent Pet. Corp.* v. *N. L. R. B.*, 204 F. (2) 613; *N. L. R. B.* v. *Inter City Adv. Co.*, 154 F. (2) 244; *N. L. R. B.* v. *Appalachian Elec. Power Co.*, 140 F. (2) 217; *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. (2) 541; *N. L. R. B.* v. *Mayer*, 196 F. (2) 286; *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. (2) 144. Cf. *N. L. R. B.* v. *Red Arrow* (5th Cir. 5-14-54).

We cannot agree with the board that the matter so stands here. Under the settled law that the remedies provided by the act are public, nor private, remedies, that orders and decrees are entered not in vindication of private, but of public, rights, it is, we think, plain that the board is not entitled to a contempt order enforcing the court's decree, if, in the court's opinion, such a contempt adjudication will result in a violation of the act and of the public policy for which it stands. The considerations which underlie the holdings of the court on which the board relies, that whether enforcement of the board's order should be granted or denied is to be determined not upon new evidence but upon the record on which the board's order is based, and, therefore, a respondent may not show as a defense in an enforcement proceeding that the union has lost its majority, have no application in a contempt proceeding to which entirely different considerations apply. In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the act, that employees are entitled to choose their own bargaining representative and may not have one not of their own choosing forced upon them, issue a contempt order which has the effect of doing so.

In this case it appears without dispute that after the entry of the board's order and before the entry of the enforcement decree in this case, the respondent complied fully with all the provisions of the order by reinstating and paying back wages to discharged employees, by posting notices and

by agreeing to bargain with the union as their representative. It further appears that, after the entry of our decree, the respondent, advised by his then employees, that they were not members of the union and that they did not wish to have the union represent them and wished it decertified, requested the board to take the proper steps to inquire into and determine the truth of the matter and the board having refused to do so, the respondent in good faith determined that it would be unlawful, unwise, and unfair for it to bargain with the union, and that it would not be contemptuous of it to refuse to bargain with it as representative of its members. Under these circumstances, we think that the court, instead of vindicating, would stultify, itself and its decree and do violence to the act if it ordered the employer to force upon its employees as bargaining agent a union not of their own choosing merely because some six years before the board had ordered the employer to recognize it as bargaining agent for its then employees.

We think that no case for a contempt order is made out. The petition is denied and the contempt proceeding is dismissed.

13-A

JUDGMENT

Extract from the Minutes of June 30, 1954

No. 13772

NATIONAL LABOR RELATIONS BOARD

v.

THE WARREN COMPANY, INCORPORATED

This cause came on to be heard on the Petition of the National Labor Relations Board for Adjudication in Civil Contempt and for other Civil Relief; and Request for Institution of Adjudication in, and Punishment for Criminal Contempt, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that said petition be, and the same is hereby, denied and the contempt proceeding is dismissed.

In the United States Court of Appeals for the Fifth Circuit

No. 13772

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED,

RESPONDENT

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(June 24, 1952)

Before HOLMES, RUSSELL, and RIVES, Circuit Judges

RIVES, *Circuit Judge:* This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act as amended,[1] for enforcement of its order issued against respondent following proceedings under Section 10 of the Act. The Board's decision and order are reported at 90 N. L. R. B. 689.

With commendable candor respondent's counsel has stated its position as follows:

> We have controverted the findings of fact of the Board in our Response, but in all fairness to this Court we are constrained to admit that there is sufficient evidence, even though disputed, upon which to base the Board's order.

[1] 61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151 et seq.

> Our Contention, therefore, is that the Board's order should not be enforced by this Court, not because of the insufficiency of evidence, but because the order has been obeyed in all of its provisions and, because of the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it. [Emphasis the respondent's.]

The Supreme Court has expressly ruled that compliance with an order of the Board does not affect the Board's right to enforcement, pointing out that the legislative history of the Act indicates that the framers of the Act contemplated "that there be 'immediately available to the Board an existing court decree to serve as a basis for contempt proceedings', in the event a renewal of the unfair practice occurs after the enforcement order." *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, 567, 569.[2]

The same decision (see page 568) settles the doctrine that the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding. See also *N. L. R. B.* v. *Sanson Hosiery Mills*, C. A. 5, No. 13726, decided April 10, 1952; cf. *N. L. R. B.* v. *Aldora Mills*, C. A. 5, No. 12900, decided June 6, 1952.

It results that the Board's petition is granted and its order

ENFORCED.

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[2] See also *N. L. R. B.* v. *American National Insurance Company*, No. 126, October Term, 1951, decided May 26, 1952, see Footnote 4; *N. L. R. B.* v. *Pool*, 339 U. S. 577, 581; *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226; *N. L. R. B.* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *N. L. R. B.* v. *Davis*, 172 F. 2d 225 (C. A. 5).

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